FILE COPY

Office Supreme Court, U.S.
FILED
NOV 30 19[illegible]
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 521

OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC., a corporation,

Petitioner-Appellant,

vs.

SAMUEL B. STEWART, CARL CHAMBERS and RAY SMITH, constituting the State Tax Commission of the State of Oregon,

Defendants-Appellees.

MOTION TO DISMISS

On Appeal from the Supreme Court of the State of Oregon.

ROBERT Y. THORNTON,
Attorney General,
ALFRED B. THOMAS,
Assistant Attorney General,
THEODORE W. deLOOZE,
Assistant Attorney General,
Attorneys for Appellees,
State Office Building,
Salem, Oregon.

HERRIS F. BOOTHE,
Attorney for Appellant,
1200 Cascade Building,
Portland 4, Oregon.
BLACK, KENDALL & TREMAINE,
Of Counsel for Appellant,
1200 Cascade Building,
Portland 4, Oregon.

SUBJECT INDEX

	Page
Motion to Dismiss	1
Statement of the Case	1
The Appeal Does Not Present A Substantial Federal Question	
A. The "Equal Protection" Clause Is Not Violated	3
B. "Due Process" Is Not Violated	4
C. The "Commerce Clause" Is Not Violated	5
Conclusion	16
Appendix A	18

TABLE OF CITATIONS

Cases

American Barge Line Co. v. Koontz, 136 W. Va. 747, 68 S.E.(2d) 56 (1951) 14, 15

Bass, Ratcliff and Gretton, Limited v. State, 266 U.S. 271, 45 S. Ct. 82, 69 L. Ed. 282 (1924) 8

Butler Bros. v. McColgan, 315 U.S. 501, 507, 62 S. Ct. 701, 86 L. Ed. 991 (1942) 4

Castle v. Hayes Freight Lines, Inc., 348 U.S. 61, 75 S. Ct. 191, 99 L. Ed. 68 (1954) 10, 12

Cloverdale v. Pipeline Co., 303 U.S. 604, 58 S. Ct. 736, 82 L. Ed. 1043 (1937) 11

Cooney v. Mountain States Tel. & Tel. Co., 294 U.S. 384, 393, 55 S. Ct. 477, 482, 79 L. Ed. 934, 942 (1935) 10, 11, 12

Duluth, South Shore & Atlantic Railroad Co. v. Michigan Corporation & Securities Commission, 353 Mich. 636, 92 N.W.(2d) 22 (1958); cert. den. 359 U.S. 310, 79 S. Ct. 876, 3 L. Ed. (2d) 831 (1959) 14, 15

East Ohio Gas Company v. Tax Commisison of Ohio, 283 U.S. 465, 470, 51 S. Ct. 499, 500, 75 L. Ed. 1171, 1174 (1931) 10, 12

Ford Motor Co. v. Beauchamp, 308 U.S. 331, 60 S. Ct. 273, 84 L. Ed. 304 (1939) 8

Page

Gartland S. S. Corp. v. Michigan Corporation & Securities Commission, 339 Mich. 661, 64 N.W.(2d) 886 (1954) 14

Gwin, White and Prince, Inc. v. Henneford et al., 305 U.S. 434, 59 S. Ct. 325, 83 L. Ed. 272 (1938) 16

International Shoe Co. v. Shartel, 279 U.S. 429, 49 S. Ct. 380, 73 L. Ed. 781 (1928) 9

Matson Nav. Co. v. State Board, 297 U.S. 441, 56 S. Ct. 553, 80 L. Ed. 791 (1936) 3, 7, 8, 16

McGoldrick v. Berwind-White Co., 309 U.S. 33, 45, 60 S. Ct. 388, 84 L. Ed. 565 (1940) 6, 7

Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S. Ct. 1425, 92 L. Ed. 1832 (1947) 4, 7

National Schools v. Los Angeles, 135 Cal. App.(2d) 311, 289 P.(2d) 151 (1955), cert. den. 350 U.S. 968, 100 L. Ed. 841, 76 S. Ct. 439 (1956) 14, 15

Norfolk & Western Railway Co v. Field, 143 W. Va. 219, 100 S.E.(2d) 796 (1957) 14, 15

Pacific Tel. Co. v. Tax Commission, 297 U.S. 403, 56 S. Ct. 522, 80 L. Ed. 760 (1935) 12

Panhandle Eastern Pipe Line Co. v. Michigan Corporation & Securities Commission, 346 Mich. 50, 77 N.W.(2d) 249 (1956) 14

Spector Motor Service, Inc. v. O'Conner, 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951) 3, 5, 6, 12, 15

Sprout v. City of South Bend, 277 U.S. 163, 171, 48 S. Ct. 502, 504, 72 L. Ed. 833, 837 (1928) 10, 11, 12

Underwood Typewriter Company v. Chamberlin, 254 U.S. 113, 41 S. Ct. 45, 65 L. Ed. 165 (1920) 8, 9, 11

Western Livestock v. Bureau, 303 U.S. 250, 58 S. Ct. 546, 82 L. Ed. 823 (1937) 6

Miscellaneous

Oregon Supreme Court Opinion, 70 Adv. Sh. 1651, 1657 ..... 2, 6

Regulation 4.280(1)-(B), Ore. State Tax Comm. 19

MOTION TO DISMISS

Defendants-Appellees, herein called defendants, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the appeal from the decree of the Supreme Court of the State of Oregon be dismissed on the ground that it does not present a substantial federal question.

STATEMENT OF THE CASE

Plaintiff-Appellant, herein called plaintiff, has set forth the applicable statutes. The statement of stipulated facts in the record on file discloses plaintiff's operation as follows:

> "Plaintiff's operations consisted of hauling freight between Portland, Oregon and San Francisco, California and way points. The bulk of its traffic in interstate commerce was between Portland, Oregon, and San Francisco, California and Klamath Falls and San Francisco and Medford. Its operations in intrastate commerce in Oregon consisted of freight hauling between Portland, Oregon, and points in western Oregon, including Coos Bay, Coquille, Grants Pass and Roseburg, with the bulk of the movement southbound from Portland, Oregon. Except for pick-up and delivery incident to its line-haul operation, plaintiff conducts no independent intracity cartage operations.
>
> "It is economically beneficial, but not necessary, for plaintiff to carry on its operations in both interstate and intrastate commerce. The local pick-up and delivery operations, the cost of administration, the cost of vehicle maintenance and the cost of other terminal operations are substantially the same charac-

ter for both plaintiff's interstate and intrastate operations. The local pick-up and delivery operations, the use of mobile equipment and the use of its terminal facilities are commingled between intrastate and interstate commerce. Plaintiff designates no property specifically for use in intrastate or interstate commerce. Line-haul trips are scheduled separately with an entire load in almost all instances destined either for an intrastate or outside-the-state destination. Plaintiff secures and handles its shipment contracts for both intrastate and interstate commerce through the same offices in Oregon."

Oregon measures its tax by determining Oregon's fraction of plaintiff's property, payroll and sales which is substantially equal to Oregon's fraction of plaintiff's line-haul miles. This results because mobile property (trucks, etc.), mobile wages (truckers' wages, etc.) and sales will be determined by the fraction or percentage resulting from dividing miles traveled in Oregon by total company miles in the three states. (Note: Plaintiff's brief, page A16, line 5, the word "into" should be deleted and the word "by" inserted—see Oregon Supreme Court Opinion, 70 Adv. Sh. 1651, line 14.) The stipulation states:

"In determining the deficiency due for each of the years the Commission instructed its auditors to compute the tax by the normal three-factor formula or the revenue (line-haul) mileage formula, whichever produced the lesser tax. The revenue formula was used because it produced the lesser tax. This procedure was adopted by the Commission because the allocation formula to be applied to transportation companies was not at the time specifically set out in regulation form."

Plaintiff operates in three states—Oregon, California and Nevada. Oregon's measure includes only income arising from business done in Oregon. The stipulation states:

> ". . . the income attributable to Oregon under the asserted Commission revenue formula added to the income attributed to California by its formula (substantially equal to the Oregon formula) and including the income attributed to Nevada does not exceed 100 percent of plaintiff's total income subject to tax for any of the years in question."

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. The "Equal Protection" Clause Is Not Violated

The third question raised by plaintiff, pages 7 and 19 of its brief, concerning violation of the "equal protection" clause was not pressed by plaintiff on appeal and not discussed in the Oregon Supreme Court Opinion. Plaintiff, on page 19 of its brief, is contending that a solely interstate business is not subject to Oregon's privilege tax, *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951), and therefore it cannot be subject to the tax as measured. The issue is directly raised in *Matson Nav. Co. v. State Board*, 297 U.S. 441, 56 S. Ct. 553, 80 L. Ed. 791 (1936), and decided against plaintiff's contention. This Court, at page 446, held that since a solely interstate operation cannot be subjected to a privilege tax because of the "commerce clause" limitation, a state legislature is without power to include solely interstate businesses within

the tax and such lack of power by the state legislature cannot be grounds for asserting violation of the equal protection clause.

B. "Due Process" Is Not Violated

The second question raised by plaintiff, pages 6 and 19 of its brief, is resolved by the statement of stipulated facts. Plaintiff concedes and has stipulated that Oregon's measure only reaches income earned in Oregon. The nature of Oregon's formula is such that it neither purports to nor does tax or measure any activity beyond Oregon's jurisdiction. The measure is based on miles traveled in Oregon. Plaintiff's district headquarters are in Oregon. Plaintiff travels regularly and systematically on scheduled routes between many Oregon cities. This Court has consistently held that a state's jurisdiction to tax in these circumstances is clear and that a measure such as Oregon's does not violate due process.

In *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 68 S. Ct. 1425, 92 L. Ed. 1832 (1947), at page 86:

> "There is no question here of due process. The gas company's property is in the taxing state where the taxable incidents occurred."

Also, *Butler Bros. v. McColgan*, 315 U.S. 501, 507, 62 S. Ct. 701, 86 L. Ed. 991 (1942), discloses that due process is concerned with whether or not there are "extraterritorial values being taxed."

The conclusion by plaintiff, second paragraph—page 19 of its brief, is stated without authority and is contrary

to judicial precedent. Oregon has jurisdiction to tax and its measure only reaches income earned in Oregon. Due process asks no more.

C. The "Commerce Clause" Is Not Violated

The first question raised by plaintiff, page 6 of its brief, appears to rest on an analysis of the decision in *Spector Motor Service, Inc., supra.* Plaintiff finds a conflict in the following portions of the opinions of the case.

The majority opinion, 340 U.S. at 609-610:

> "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate."

The minority opinion, 340 U.S. at 610-611:

> "Hence, if appellant had been engaged in one iota of activity which the court would have been willing to call 'intrastate', Connecticut could have applied its tax to the company's interstate business in the precise form which it now seeks to employ—a tax on the privilege of doing business in Connecticut measured by the entire net income attributable to the state, even though derived from interstate commerce."

The issue presented is whether the "reasonable limits" phrase of the majority statement ought to be construed to limit the computation to exclude any interstate income if possible or should it be construed to limit the compu-

tation to business done within the state "including both interstate and intrastate."

Defendants see no conflict in the two statements. The analysis advocated and adopted by the Oregon Supreme Court, 70 Adv. Sh. 1657, to tax interstate business where state jurisdiction is present by a measure that includes all intrastate and interstate business in the state is consistent with the many cases dealing with the problem. The *Spector* case is not novel in this respect for many early decisions are similar in the analysis of a proper measure.

Thus, in *Western Livestock v. Bureau*, 303 U.S. 250, 58 S. Ct. 546, 82 L. Ed. 823 (1937), New Mexico levied a privilege tax on business done within the state measured by gross receipts. The taxpayer solicited interstate advertising in conjunction with its local printing business and contended that the tax could not be levied against such portion because of the commerce clause. The court sustained the gross receipts measure of the tax and declared at page 255:

> "* * * If the commerce is carried on by a corporation a franchise tax may be imposed, measured by the net income from business done within the state, including such portion of the income derived from interstate commerce as may be justly attributable to business done within the state by a fair method of apportionment. [cit.]"

The legal principle applied to determine whether the measure is constitutional in regard to the commerce clause is whether or not the measure tends to place interstate commerce at a competitive disadvantage. *McGold-*

rick v. Berwind-White Co., 309 U.S. 33, 45, 60 S. Ct. 388, 84 L. Ed. 565 (1940), which is equal to the test of whether or not interstate commerce is being discriminated against. The same principle is restated in a different way in *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 88, 68 S. Ct. 1425, 92 L. Ed. 1832 (1947):

> "A glance at the activities named above [local activities in maintaining, keeping in repair, and otherwise in manning 135 miles of pipeline in Mississippi] shows that there is no possibility of multiple taxation through the same exaction by the states. The amount of the tax is reasonable. It is properly apportioned to the investment in Mississippi." (Bracketed material ours.)

The Mississippi tax was imposed on the activities named and measured by $1.50 for each $1,000 of value of property employed in Mississippi. The measure of the tax included interstate business, since the parties stipulated that no intrastate business was done. This Court sustained the measure however when it sustained the tax as being properly imposed on a "local incident". The concurring opinion, at page 96, explains that though interstate business was included in the measure, the tax was not an unreasonable burden on interstate commerce. The unreasonable burden philosophy is another way of stating that interstate commerce cannot be placed at a competitive disadvantage or discriminated against or subjected to multiple taxation. Oregon's taxing formula violates none of the tests.

In *Matson Nav. Co. v. State Board*, 297 U.S. 441, 56 S. Ct. 553, 80 L. Ed. 791 (1936), California sustained a

privilege tax measured by net income from all sources of business done within the state, whether foreign, domestic or interstate. The taxpayer was a domestic corporation but the measure was not sustained for that reason. This Court declared at page 444:

> ". . . A net income justly attributable to all classes of business done within the state may be used as a measure of a tax imposed to pay the state for the use therein of the corporate franchises granted it."

The corporate franchises referred to include the franchise to do business rather than merely the charter granted, for the court cited as its authority *Bass, Ratcliff and Gretton, Limited v. State*, 266 U.S. 271, 45 S. Ct. 82, 69 L. Ed. 282 (1924), and *Underwood Typewriter Company v. Chamberlin*, 254 [redacted], 41 S. Ct. 45, 65 L. Ed. 165 (1920), both of which involved foreign corporations.

Following the *Matson* case, *Ford Motor Co. v. Beauchamp*, 308 U.S 331, 60 S. Ct. 273, 84 L. Ed. 304 (1939), applied the same principle to a foreign corporation, holding that a state's power to tax foreign corporations is as unrestricted as that for domestic corporations so far as the commerce clause is concerned. It sustained a doing business privilege tax measured by gross receipts to determine capital employed in the taxing state (Texas). The taxpayer had contended that the measure was unreasonable since it reached assets employed in interstate commerce. This Court held the imposition was properly laid on an intrastate privilege and the measure thereof was reasonable since it was limited to property within the taxing jurisdiction.

The foregoing principles and other objections to Oregon's type of measure had been resolved in favor of state taxation very early in the *Underwood Typewriter* case, *supra*, where Mr. Justice Brandeis declared at page 119:

> "It is contended that the tax burdens interstate commerce and hence is void under § 8 of Article I of the Federal Constitution. Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business. Its enforcement is left to the ordinary means of collecting taxes. *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U.S. 350, 364; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U.S. 160, 163. The statute is, therefore, not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce. A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the State. *Postal Telegraph Cable Co. v. Adams*, 155 U.S. 688, 695. This tax is based upon the net profits earned within the State. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce is settled. *U.S. Glue Co. Oak Creek*, [sic] 247 U.S. 321; *Shaffer v. Carter*, 252 U.S. 37, 57. Compare *Peck & Co. v. Lowe*, 247 U.S. 165. Whether it be deemed a property tax or franchise tax, it is not obnoxious to the commerce clause."

The same conclusion was reached in the *International Shoe Co. v. Shartel*, 279 U.S. 429, 49 S. Ct. 380, 73 L. Ed. 781 (1928), at page 433:

> "A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business,

if apportioned to business done or property owned within the state, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce * * *"

Plaintiff cites four cases in support of the conflict it finds in the two statements from the *Spector* decision.

Sprout v. City of South Bend, 277 U.S. 163, 171, 48 S. Ct. 502, 504, 72 L. Ed. 833, 837 (1928)

East Ohio Gas Company v. Tax Commission of Ohio, 283 U.S. 465, 470, 51 S. Ct. 499, 500, 75 L. Ed. 1171, 1174 (1931)

Cooney v. Mountain States Tel. & Tel. Co., 294 U.S. 384, 393, 55 S. Ct. 477, 482, 79 L. Ed. 934, 942 (1935)

Castle v. Hayes Freight Lines, Inc., 348 U.S. 61, 75 S. Ct. 191, 99 L. Ed. 68 (1954)

The four cited cases evidence the fact that plaintiff is confusing the constitutional issue concerning the imposition of a tax with a separate constitutional issue concerning the measure of a tax which has been properly imposed. The issue on a proper measure requires proof by plaintiff that the measure affects it unreasonably.

The tax in the *Sprout* case was a license fee and was stricken because its very nature made it a burden on interstate commerce. The tax was not limited to activity within the taxing jurisdiction and the amount was increased because of the interstate movement beyond the

state. The tax in the *Cooney* case was laid on interstate commerce as stated by this Court in *Cloverdale v. Pipe Line Co.*, 303 U.S. 604, 58 S. Ct. 736, 82 L. Ed. 1043 (1937), at page 611:

> "In the . . . *Cooney* case, taxes levied on the business of engaging in interstate commerce were held invalid."

and at page 609:

> "While a privilege tax by a state for engaging in interstate business has frequently met the condemnation of this Court as a regulation of commerce [citing *Cooney* and *Sprout* cases] privilege taxes for 'carrying on a local business' even though measured by interstate business, have been sustained."

The defect found to exist in both cases was that the fee imposed could not be properly apportioned since the fee was exacted in the same manner for the buses in the *Sprout* case and telephones in the *Cooney* case, whether operated wholly within the state or between states. Interstate commerce could be similarly taxed in every other jurisdiction to its disadvantage. This conclusion is clear from the early opinion of Mr. Justice Brandeis (who wrote the *Sprout* opinion) in *Underwood Typewriter Company* case, supra, at page 119, where this Court declares:

> "That a tax measure by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce is settled."

It is insufficient for plaintiff merely to show that interstate business is included in the measure; plaintiff

must prove the measure imposes an undue burden upon interstate commerce or discriminates against it. This is also seen from the discussion by Mr. Justice Brandeis in a subsequent opinion in *Pacific Tel. Co. v. Tax Commission*, 297 U.S. 403, 56 S. Ct. 522, 80 L. Ed. 760 (1935), at page 413:

> "A tax upon the local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce."

The result must be judged by reason of its consequences and by its practical operation. Oregon has laid its tax on a constitutionally allowable privilege (plaintiff doing business in the state) and its measure is reasonable. Where the nature of the imposition is a burden on interstate commerce as in the *Sprout* and *Cooney* cases, the tax should be stricken but where the imposition is not a burden, the taxpayer should demonstrate the measure is a burden. Plaintiff has made no attempt to show that the measure of Oregon's properly imposed privilege tax burdens interstate commerce.

The *East Ohio Gas Company* case rests on the decision in the *Sprout* case and appears to be within the above analysis. The *Castle v. Hayes* case is not relevant to the issue before this Court. The state in that case was attempting to bar a carrier from operation within the state. The principle is within the doctrine affirmed in the *Spector Motor Service* case.

Plaintiff further contends, at page 17 of its brief:

> "Another important aspect of this substantial federal question involving interstate commerce should

also be considered. In reversing the trial court, the Supreme Court of the State of Oregon characterized the difference between a tax on the privilege of doing business as set forth in § 110-1506, O.C.L.A., as amended by Chapter 280, Oregon Laws, 1949 (ORS 317.070) and measured by net income and a tax levied directly on net income as merely a matter of labels attached to the cases by the United States Supreme Court (see A19, infra). The decision of the Supreme Court of Oregon rested in part upon the erroneous premise that there is no essential difference in the formula application between a tax on net income and a tax on the privilege of doing business measured by net income. This determination entirely failed to consider the different operating incidences of the two forms of taxation and the legal consequences flowing therefrom as established by this Court in the following leading cases."

The Oregon court expressly found no issue on the matter of the difference between an income tax and a privilege tax measured by net income (Oregon's net income tax was not in effect during the years at issue). The Oregon court, at page 1651 (Pl. Br., p. A19), states:

". . . plaintiff concedes that if the tax here in question were labeled 'income tax' it would be compelled to pay the tax and the commission concedes that since the tax in question is labeled a 'privilege' tax, the plaintiff could not be taxed at all if its entire business were interstate. Neither party has attempted to ascertain if there is any actual difference, except the label, in the nature of the taxes imposed nor, by formulation of an issue, required this court to do so. We will take the parties as we find them."

The Oregon decision was based on the fact the plaintiff was doing business in Oregon and the measure reason-

ably reached only income earned in Oregon. Plaintiff's brief in this regard has strayed from the issues to discuss dicta. If the Oregon court's discussion raises a question it should not be an appealable one. A substantial federal question should not arise from a court's dicta.

Plaintiff further argues at pages 15 and 16 of its brief that the various state courts are in conflict and for that reason a substantial federal question is presented. Plaintiff cites the following cases:

American Barge Line Co. v. Koontz, 136 W. Va. 747, 68 S.E. (2d) 56 (1951) (Measure of tax limited to intrastate commerce on barge line)

Norfolk & Western Railway Co. v. Field, 143 W. Va. 219, 100 S.E.(2d) 796 (1957) (Measure apparently permitted to include interstate commerce portion of railroad line)

Gartland S. S. Corp. v. Michigan Corporation & Securities Commission, 339 Mich. 661, 64 N.W.(2d) 886 (1954) (Interstate traffic excluded in measure of privilege tax)

Panhandle Eastern Pipeline Co. v. Michigan Corporation & Securities Commission, 346 Mich. 50, 77 N.W.(2d) 249 (1956) (Interstate traffic must be excluded in measure of privilege tax)

Duluth, South Shore & Atlantic Railroad Co. v. Michigan Corporation & Securities Commission, 353 Mich. 636, 92 N.W.(2d) 22 (1958); cert. den. 359 U.S. 310, 79 S. Ct. 876, 3 L. Ed.(2d) 831 (1959) (Interstate trackage of railroad included in measure of privilege tax)

National Schools v. Los Angeles, 135 Cal. App.(2d) 311, 289 P.(2d) 151 (1955); cert. den. 350 U.S. 968, 100 L. Ed. 841, 76 S. Ct. 439 (1956) (Privilege tax limited to income from intrastate business)

The three jurisdictions involved are West Virginia, Michigan and California. The earlier *American Barge Line Co.* case involved a statute which laid a tax on the privilege of engaging in intrastate commerce and also laid a tax on the privilege of engaging in interstate commerce. The court held that the latter tax could not be laid, that the statute was segregable and sustained the privilege tax laid on intrastate commerce. The court's conclusion is consistent with the rule laid down in the *Spector* case. Furthermore, the court noted, at page 58, that the taxpayer had no office or place of business located in West Virginia nor was any employe stationed in West Virginia. West Virginia's position is set out in the recent *Norfolk & Western Railway Co.* case which is somewhat similar to the facts presented here and the holding is the same as advocated by Oregon. It appears that where an imposition is properly laid, West Virginia measures its tax in a manner similar to Oregon.

The two earlier cases cited from Michigan are fully discussed in the later *Duluth, South Shore & Atlantic Railroad Co.* case. That case is on all fours with the case presented here. Michigan measures a tax properly imposed in a manner similar to Oregon.

In the *National Schools* case the City of Los Angeles levied an unapportioned gross receipts tax. The court concluded that if California were allowed to measure its tax by all receipts and other states in which the taxpayer did business would measure the tax by local receipts, the tax at the domicil is clearly seen to burden

interstate commerce in a way not equal to a tax on similar businesses operating wholly within the state. This decision is consistent with the decision of this Court in *Gwin, White and Prince, Inc. v. Henneford et al.*, 305 U.S. 434, 59 S. Ct. 325, 83 L. Ed. 272 (1938). Where the tax is properly imposed the measure can include all business within the state and California's position is clearly set forth in *Matson Nav. Co. v. State Board*, 297 U.S. 441, 56 S. Ct. 553, 80 L. Ed. 791 (1936), affirming 3 Cal.(2d) 1, 43 P.(2d) 805 (1935), where this Court held that California's privilege tax (equal to Oregon's) can be measured by net income from all sources of business done within the state, whether foreign, domestic or interstate.

It is thus seen that, contrary to plaintiff's contention, Oregon joins the cited trio of states to form a harmonious quartet.

CONCLUSION

The allocation formula (see Appendix A) employed by Oregon measures plaintiff's tax in the same manner it measures the tax of any other corporation doing business in Oregon, whether foreign or domestic. The cases presented demonstrate that a state's allocation formula for measuring a privilege tax properly imposed can constitutionally include both intrastate and interstate business done within the state in the measure. Oregon's tax need not be paid as a condition of doing business in

Oregon, it places no bar on interstate operations and is collected through ordinary means. Oregon's formula, as applied, can never reach income earned outside of Oregon so as to be violative of due process.

Oregon has granted plaintiff the privilege to do business in Oregon. Oregon has power to grant the privilege and plaintiff is exercising the privilege granted. The commerce clause, under the facts presented, requires that plaintiff not be given less favorable treatment by Oregon than is given local commerce. This Oregon has done under a formula which is demonstratively fair and reasonable.

It is respectfully submitted that the opinion of the Oregon Supreme Court be maintained and that the appeal of plaintiff herein be dismissed.

Respectfully submitted,

ROBERT Y. THORNTON
Attorney General for the State of Oregon

ALFRED B. THOMAS
Assistant Attorney General

THEODORE W. de LOOZE
Assistant Attorney General

APPENDIX A

Regulation 4.280(1)-(B) applicable to carriers of freight or passengers.

"*Modification of factors for carriers of freight or passengers.* A substantial portion of the net income of taxpayers engaged in the transportation of freight or passengers within and without Oregon results from the movement of revenue-producing equipment, drivers and other personnel. It is therefore necessary in calculating the apportionment factors of such carriers to reflect the results of the movement of such equipment and personnel through modification of the three factors by using revenue miles traveled both within and without the state. Thus, the apportionment formula of such transportation companies is to be computed as follows:

"(1) *Tangible property.* Fixed properties, such as buildings and land used in the business, shop equipment, cars and trucks used in gathering or delivering local freight, will be assigned to the state in which such properties are located. The value of trucks or other equipment used in over-the-road hauling or other transportation will be assigned to this state on a mileage basis. For example, if ten percent of a taxpayer's revenue miles are in Oregon, then ten percent of the value of the revenue-producing equipment will be included as part of the Oregon property factor.

"(2) *Salaries and wages.* The wages and salaries of employes assigned to fixed locations within this state

shall be included in the Oregon wage factor. The wages of personnel of over-the-road or other transportation equipment will be assigned to this state upon the basis of revenue miles. The wages of such personnel shall be apportioned to Oregon in the proportion that revenue miles traveled within this state bear to the total revenue miles traveled everywhere.

"(3) *Revenues or sales.* Revenues will be assigned to this state in the proportion that the revenue miles traveled within the state bear to the total revenue miles traveled everywhere."